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No. 15-1191

In the

Supreme Court of the United States

LORETTA LYNCH,
ATTORNEY GENERAL OF THE UNITED STATES,
Petitioner,

v.

LUIS RAMON MORALES-SANTANA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICI CURIAE OF THE NATIONAL IMMIGRANT JUSTICE CENTER, THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AND THE NORTHWEST IMMIGRANT RIGHTS PROJECT IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE

Amicus National Immigrant Justice Center (NIJC) is a non-profit agency that represents individuals regarding citizenship and immigration matters. Together with over 1500 pro bono attorneys, NIJC represents thousands of individuals annually, including individuals seeking determinations that they or their children have acquired citizenship at birth.[1]

Amicus American Immigration Lawyers Association (AILA) is a national organization comprised of more than 13,000 immigration lawyers throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA's objectives are to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in immigration, nationality, and naturalization matters. AILA's members regularly appear in immigration proceedings, often on a pro bono basis.

Amicus Northwest Immigrant Rights Project ("NWIRP") is a non-profit legal organization dedicated to the defense and advancement of the legal rights of noncitizens in the United States with respect to their immigrant status. NWIRP provides direct rep-

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[1] Amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than Amici and their counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to this filing have been submitted to the Clerk.

resentation to low-income immigrants in removal proceedings and before the federal courts. NWIRP also provides representation, workshops and legal advice to low-income immigrants in detention.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici are experts in citizenship law, and offer this brief to clarify and correct several points addressed in the Government's opening brief.

First, the Government seeks to downplay the equal protection problems with the statute by noting that Respondent might have mooted the issue by naturalizing. This is unresponsive to the issue before the Court: Naturalization is not cheap, particularly for the poor and working class. Naturalization is not simple; the form is lengthy and complex. Naturalization is not foolproof: forms can be misfiled or lost, applications can be delayed or abandoned. The naturalization route implicates a host of issues that are not implicated by at-birth citizenship. It is not equal to at-birth citizenship, which guarantees that children of U.S. citizens will be recognized as Americans in their adulthood.

Second, the Government is incorrect when it suggests that eliminating distinctions between fathers and mothers would disadvantage some applicants. Even if the Government's cramped reading of "continuous" were correct—and Amici explain that it is not—it would not disadvantage anyone because the possibility of acquiring citizenship under 8 U.S.C. § 1409(c) (1958) does not exclude potential acquisition of citizenship under other provisions. The Government also complains of the remedy ordered, but instead of offering different language, it seeks to

use that as an opening to leave Mr. Morales-Santana without a remedy. To the extent that the holding below would do more than intended, a simple clarification would solve any problems.

Third, the Government expends pages addressing naturalization authority without acknowledging that under the statutory definition of naturalization, at-birth citizenship is not a type of naturalization. For purposes of the Immigration and Nationality Act (INA), naturalization is defined to exclude citizenship at birth. Any limitations by Congress on judicial authority in the "naturalization" context are inapposite to this case because the plain text of the statute makes them applicable only to citizenship granted after birth.

Fourth, the Government's argument overlooks crucial functions played by at-birth citizenship statutes. These statutes respect the dignity of U.S. citizen parents by treating their children as automatic citizens from the day of their birth. The direct effect of this approach is to guarantee that the child will not be subject to deportation and will always be acknowledged as an American. U.S. citizen parents can rest easy knowing that whatever other difficulties may befall their children, they will not be deprived of their U.S. citizenship.

Finally, Amici draw the Court's attention to a separate citizenship statute, 8 U.S.C. § 1432 (1958),[2] which, though not directly relevant here, provides additional evidence that § 1409(c) was motivated by impermissible gender stereotypes. Section 1432

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[2] The immigration statutes have been repeatedly amended. For consistency's sake, Amici cite to the statute as in effect in 1958, unless otherwise noted.

granted automatic citizenship after birth to individuals when a parent or parents naturalized and when the child was present in the United States as a permanent resident. The current statutory incarnation, 8 U.S.C. § 1431 (2015), is gender-neutral. The statute applicable at the time of Respondent's minority, however—enacted simultaneously with §1409(c)—granted automatic citizenship after birth more favorably to children of unmarried U.S. citizen mothers than to children of unmarried U.S. citizen fathers. An unmarried father was unable to convey citizenship through former § 1432 unless the child's mother was deceased. This related section offers further evidence that the statute at issue here impermissibly discriminates on the basis of gender stereotypes.

ARGUMENT

This brief addresses and refutes several points made by the Government in attempting to minimize the harm engendered by the statute or to problematize the remedy appropriately selected by the lower court.

I. Naturalization is Complicated, Costly, and Subject to Various Obstacles; At-Birth Citizenship is Automatic and Foolproof.

The Government suggests, in essence, that any unequal treatment based on gender would be harmless if the children of citizens made prompt use of the general naturalization statutes and never got into trouble. Congress, argues the Government, "cannot be faulted if petitioner did not seek to take advantage" of the opportunity to naturalize once he became an adult. Pet. Br. 48.

The Government's argument misses the point. Whatever Respondent might have done in his late teens or twenties—decades after the equal protection claim arose—is irrelevant to whether his father's constitutional rights were violated.

The availability *vel non* of naturalization eligibility does not place a citizen father in the same position as a citizen mother. The child of an unmarried citizen father must overcome numerous hardships and burdens that are not faced by those who acquire citizenship at birth. The naturalization application process is complicated and costly. The application may be lost, or adjudication delayed. An applicant, commonly unrepresented, may make mistakes which prevent or postpone citizenship. In the meantime, the consequence of any error may be loss of rights and deportation.

At-birth citizenship guarantees that children of U.S. citizens will be recognized as Americans without regard to unknown future events. It provides a father or mother with certainty that—barring an intentional, volitional choice to renounce citizenship, *Afroyim v. Rusk*, 387 U.S. 253 (1967)—their child will never be excluded from this country. Naturalization, by contrast, is not automatic and does not place children of unmarried citizen fathers in an equivalent position to the children of unmarried citizen mothers.

A. Naturalization is Complex and Costly.

The fee for naturalization (not including attorney fees) is currently $680. *See* USCIS, *Instructions for Application* for Naturalization 14 (Mar. 26, 2016). That amount represents almost two weeks of salary for the average American. Bureau of Labor Statis-

tics, Real Earnings – August 2016, USDL-16-1829 3 (Sept. 16, 2016). Indeed, naturalization fees have increased 716% in the past 18 years, far in excess of the rate of growth of wages. *See* MIGRATION POLICY INSTITUTE, IMMIGRATION FEES IN CONTEXT (Feb. 2007).

Moreover, the naturalization application has become increasingly burdensome and complicated. The form instructions are 18 pages. *See* USCIS, *Instructions for Application for Naturalization*, *supra*. The naturalization form itself is 20 pages long. USCIS, *Application for Naturalization* (Mar. 26, 2016). The naturalization form requires an applicant to provide a plethora of information. The form asks for detailed employment history going back several years. *Id.* at 6. It requires an applicant to list all trips outside the United States for the past five years, and to include the total number of days outside the U.S. and the countries visited. *Id.* at 7. To complete the form conscientiously requires many hours and is often impossible in a single sitting.

Moreover, several questions are ambiguous or legally complex. Notably, Part 12 of the form asks a series of 91 questions, many of them complex and compound in nature, regarding many aspects of the applicant's background. *Cf.* 81 AM. JUR. 2D *Witnesses* § 714 (2008) ("The vice of the compound question is generally recognized"). For instance, one of those 91 questions requires the applicant to list "any organizations, association, fund, foundation, party, club, society, or similar group in the United States or in any other location in the world," which the applicant has ever been "a member of, involved in, or associated with." Application for Naturalization, *supra*, 12. Failure to fully and accurately answer these ques-

tions may delay adjudication or subject the applicant to allegations of misrepresentation. *Cf. Kungys v. United States*, 485 U.S. 759, 767 (1988) (in denaturalization context).

And filing a naturalization application implicates far more than time and money. The Federal Reporter is littered with examples of individuals who have been placed into removal proceedings as a result of applying for naturalization. To pick an example, Paul Kiorkis is an Assyrian Christian who immigrated lawfully with his parents and siblings, but had one misdemeanor drug conviction resulting in probation. After seeking to become a citizen like the rest of his family, his drug possession offense came to light, he was placed into removal proceedings and denied all relief. *See, e.g., Kiorkis v. Holder*, 634 F.3d 924, 927 (7th Cir. 2011), as amended (Mar. 10, 2011). An applicant for naturalization places their legal status (and life as they know it) at risk.

Unfortunately, many individuals are not in a position to hire an attorney to guide, advise, and represent them in seeking citizenship. The average income for recent lawful entrants is substantially less than for Americans generally. *See* JEFFREY S. PASSEL AND D'VERA COHN, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 12 (Pew Research Ctr., Apr. 14, 2009). It is the experience of Amici that a substantial number of individuals in the position of Respondent and his father cannot easily afford counsel.

Recognizing these barriers to naturalization, several states and private funders have acted to subsidize legal counsel to individuals seeking to naturalize; some have even made loans available to help with naturalization filing fees. ADAM HUNTER AND

KARINA SHKLYAN, THE PEW CHARITABLE TRUSTS, THE STATE OF THE STATES ON NATURALIZATION (July 14, 2016) available at http://bit.ly/2cR7fle. These laudable efforts help many thousands of people annually, and advance the national interest by binding these hardworking individuals ever more closely to this country, culminating in an oath to protect it. But these programs exist only in a minority of states and (due to funding limitations) cannot help everyone even in those states.

B. Even Properly Filed Naturalization Applications Can Be Delayed, Lost, or Never Adjudicated.

Moreover, unlike automatic citizenship from birth, naturalization applications are subject to the vagaries of delay, loss, and abandonment. Even where an individual has filed a proper application for naturalization, in the right location, with the right fee, and where the individual is not barred from naturalization, there is no guarantee that the application will be adjudicated to completion.

Sometimes, a naturalization application may simply be lost by the agency, and thus not adjudicated. For instance, Hector Duran-Pichardo sought naturalization after 16 years as a permanent resident, during which time he was married and had two citizen children. *Duran-Pichardo v. Att'y Gen. of U.S.*, 695 F.3d 282, 283 (3d Cir. 2012). After passing his naturalization examination, he was told to await an oath ceremony. *Id.* Unfortunately, his file was mislabeled and partly lost. Id. Ten years passed without adjudication, despite his multiple attempts to move the process forward. *Id.*

Naturalization applications can be subject to delay even where the file is not mislaid or lost. Indeed, delays in this context are common enough that Congress created a special cause of action allowing naturalization applicants to go into federal court to remedy naturalization delay. 8 U.S.C. § 1447(b); *see Walji v. Gonzales*, 500 F.3d 432, 435 (5th Cir. 2007) (collecting cases).

Where applications are mislaid or delayed, other problems multiply. If an address change goes awry, the applicant will not receive notice of interviews, resulting in further delay or even closure of the file. *Contreras-Rodriguez v. U.S. Att'y Gen.*, 462 F.3d 1314, 1315 (11th Cir. 2006). Even where the applicant attends their naturalization interview and passes the examination on U.S. history and English, the application will be approved, but the process requires one more step: a public oath ceremony. Until an individual takes a public oath, they do not obtain citizenship. *Duran-Pichardo*, 695 F.3d at 283.

As with most aspects of immigration law, the problem is exacerbated by the high rate of pro se applications. This can lead to simple procedural errors. An unrepresented individual might file a change of address form with the wrong branch or at the wrong address. *Cf. Thongphilack v. Gonzales*, 506 F.3d 1207, 1210 (10th Cir. 2007) (noncitizen removed in absentia despite orally advising court of new address, friend failed to deliver written address change); *Terezov v. Gonzales*, 480 F.3d 558, 562 (7th Cir. 2007) (noncitizen failed to keep copy of change of address form, had proof of receipt of a mailing). Lack of counsel is even more significant where the case involves some legal complexity or would require federal court litigation to address delays. 8 U.S.C. § 1447(b).

The point is not that the system is in need of reform—though it is—but simply that it is not foolproof. Some applicants will slip through the cracks.

C. At-Birth Citizenship Eliminates These Risk Factors.

As shown, it is in the nature of the naturalization process that some young people will be delayed in filing an application, while others will file but not complete the process. Some young people will fail to become citizens at the first opportunity, placing their futures and their family's unity at risk. A young person, busy pursuing an education, falling in love, finding a job, supporting her parents, watching out for siblings, or simply in making a life for herself, will not always prioritize naturalization above all else. Meanwhile, this approach leaves the child's citizenship in suspense throughout minority, diminishing the father's rights as a citizen and refusing to accord his child the same respect given to the children of other Americans.

Failure to become a citizen can place at risk the child's right to reside in the United States. A noncitizen is always subject to removal from the United States. Removal proceedings may be triggered by brushes with the law; minor offenses punishable by probation or fines, may nevertheless trigger removal. *See generally* 8 U.S.C. § 1227(a)(2); *cf. Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2583 (2010) (noting that individual was removable although not aggravated felon). But the consequences of a lack of citizenship are wide-ranging. A permanent resident may not take up residence abroad without abandoning her residence. *See Matter of Huang*, 19 I&N Dec. 749, 753 (BIA 1988). Even work for an American company abroad can trigger abandonment and re-

quires an individual to take steps to preserve their residence. *Cf.* 8 C.F.R. § 223.1(a) (allowing resident to seek reentry permit); 8 U.S.C. § 1427(b) (allowing some employees to preserve residence for naturalization purposes). Permanent residents may be hindered from applying for certain kinds of employment or for security clearances. *See* USA Jobs: Employment of non-citizens, https://www.usajobs.gov/Help/working-in-government/non-citizens/ (last visited Sept. 30, 2016). And of course, a noncitizen cannot vote in American elections. 18 U.S.C. § 611.

At-birth citizenship does not subject the precious right of citizenship to these vicissitudes. It is in the nature of the at-birth citizenship that citizenship adheres automatically and without regard to any procedural missteps. Individuals who acquire citizenship at birth are able to obtain a certificate upon application at any point, after taking the oath of allegiance. 8 C.F.R. § 341.5(b). The Second Circuit's approach guarantees an unmarried citizen father the same assurance that his child will be recognized as an American as is given to unmarried citizen mother. This approach give due weight to the citizenship rights of the father, and protects the interest in family unity.

II. The Government Incorrectly Suggests that Eliminating Distinctions Based on Gender Would Work to Disadvantage Applicants.

Not only does the Government downplay the importance of at-birth citizenship by ascribing a child's failure to obtain citizenship to their failure to naturalize, it also improperly tries to turn the problem on its head, suggesting that eliminating gender distinctions would disadvantage other applicants. The Gov-

ernment's point turns on some minor language in the remedy ordered by the Court of Appeals, turning that minor point into an argument against any remedy at all. The Government argues that the one-year physical presence requirement in § 1409(c) must be "continuous," whereas § 1401(a)(7) applied to a "period or periods" of physical presence, which could thus be discontinuous.

The point is incorrect, irrelevant, and theoretical. It is incorrect because *INS v. Phinpathya*, 464 U.S. 183 (1984) does not require courts to treat the continuity requirement in § 1409(c) as broken by any departure no matter how brief. The point is irrelevant because the Government concedes (as it should) that § 1409(c) is not exclusive to acquisition of citizenship under § 1401(a)(7). That is, even if a case could be found in which a parent could meet the § 1401(a)(7) requirement but not the § 1409(c) requirement, the child would still be a citizen. Moreover, the Government's point is purely theoretical; the Government can point to no individual ever found to have acquired over ten years of cumulative physical presence who was not also continuously present for one year at some point prior to a child's birth.

In the end, the Government is not arguing that the *statutory scheme* turns the remedy into a double-edged sword, but rather that language in the lower court's opinion appears to make its remedy exclusive. The Government overreads that language, but the solution, if one were required, would be simply to clarify the remedy.

A. *Phinpathya* ought not be imported to this context.

The issue in *Phinpathya* was whether the continuous physical presence requirement for Suspension of Deportation under 8 U.S.C. § 1254(a)(1) (1984) was properly understood to permit brief, casual, and innocent departures. Ms. Phinpathya was an "*unlawful* alien who could have been deported even had she remained in this country," who had no "statutory right to remain in this country." 464 U.S. at 195 (emphasis in original). The Court declined to adopt the "generous" and "liberal" reading urged by Ms. Phinpathya. *Id.* at 192. Justice Brennan, concurring, agreed that the brief, casual, and innocent standard ought not be imported from *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), to the Suspension context. *Phinpathya*, 464 U.S. at 196. He wrote separately to disagree with language in the majority which "seems to imply that Congress intended the term 'continuous' ... to be interpreted literally." *Id.* at 196-97.

In the wake of *Phinpathya*, agency precedent found that the term "continuous physical presence" must be read to preclude any absences unless the statute provided for exceptions to the continuity requirement. *Matter of Graves*, 19 I&N Dec. 337 (Comm. 1985).

Two years after *Phinpathya*, Congress legislated to overrule that decision. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 315(b)(3) 100 Stat. 3359, 3439-40. The new provision provided that "[a]n alien shall not be considered to have failed to maintain continuous physical presence in the United States... if the absence from the United States was brief, casual, and innocent and did not

meaningfully interrupt the continuous physical presence." 8 U.S.C. § 1254(b)(2) (1986). However, the new provision was located in the section pertaining to Suspension of Deportation, the remedy at issue in *Phinpathya*. The agency thereafter found that the new statute did not apply outside the Suspension context. *Matter of Copeland*, 19 I&N Dec. 788, 789 (Comm'r. 1988).[3] *Copeland* held explicitly as Justice Brennan feared: "Any departure from the United States *for any reason or period of time* bars a determination that an alien has been continuously physically present." *Id.* (emphasis added). The Agency explicitly found its hands tied: "in light of the Supreme Court's strict literal interpretation of *Phinpathya*, ... the Service is bound to follow the plain language of section 316(b)." *Id.* at 790.[4]

Ironically, "continuous physical presence" is not understood literally in the context of the undocumented, though *Phinpathya* was premised in part on the Court's conclusion that Congress wanted to be

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[3] The statute at issue in *Copeland* allows employees of the U.S. government, U.S. research institutions, and specified other employers to "preserve" their residency despite being assigned abroad. 8 U.S.C. § 1427(b). (Mr. Copeland, a British national, had been sent to Korea. 19 I&N Dec. at 789.).

[4] This is not the only instance of the immigration agencies treating a decision of this Court in one context as binding in another. In *Negusie v. Holder*, 555 U.S. 511, 518 (2009), for instance, the agency applied the Court's decision in *Fedorenko v. United States*, 449 U.S. 490, (1981), to a different statute in a different context. The agency did not understand that context mattered: "the BIA ... adopted wholesale the *Fedorenko* rule" and found it to "'mandate[] a literal interpretation'" which excluded the possibility of a duress exception. *Negusie*, 555 U.S. at 521 (quoting *Matter of Laipenieks*, 18 I. & N. Dec. 433, 464 (1983)).

"harsh" in that context. 464 U.S. at 194. Continuous physical presence was found to preclude brief departures by permanent residents, who have a right to come and go freely from the United States. *Copeland Supra* In the case at bar, the Government argues here that it precludes brief travel abroad by U.S. citizens.

The Agency is adopting *Phinpathya*'s conclusion without regard to statutory context, purpose, and structure. *See Copeland*, 19 I&N Dec. at 789. Amici agree that the word "continuous" must be given effect; but that a period of presence can be terminated does not answer the question of what is required for that termination to occur. What makes a period continuous and what interrupts continuity necessarily depends on the context and circumstances. *Cf. United States v. Fullard-Leo*, 331 U.S. 256, 281 (1946) (considering continuity for purposes of adverse possession). *Phinpathya* did not hold otherwise, and did not purport to address this context. The agency is wrong when it maintains that context is irrelevant when interpreting a statute.[5]

The Court, of course, need not address this issue to rule for Mr. Morales-Santana. But insofar as the Government urges that the Second Circuit's rule would limit acquisition of citizenship due to the continuity requirement, its argument turns on a view of *Phinpathya* that cannot withstand scrutiny. To the extent that the Court reaches the issue, the Court

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[5] Indeed, if one were to ignore context, it would follow that courts would give effect to the Congressional choice to overturn *Phinpathya*, which indicates that when Congress uses the term "continuous physical presence," it does not mean for non-meaningful departures to interrupt that period.

should clarify that *Phinpathya* does not control in this context.

B. Section 1409(c) Is Not Exclusive and Would Not Prejudice the Ability of a Mother to Convey Citizenship Under Other Citizenship Statutes.

The text of § 1409(c) does not provide an exclusive path to acquired citizenship. That is, § 1409(c) does not provide that a child of an unmarried citizen mother acquires citizenship at birth *only* under that section. Rather, a child may acquire citizenship at birth under § 1409(c) "notwithstanding" the provisions of § 1409(a). Nothing in the INA prevents children from acquiring citizenship under other provisions simply because § 1409(c) would grant at-birth citizenship if her mother met the criteria under that section.

The Government concedes that § 1409(c) is not exclusive; at a minimum, it admits that a U.S. citizen woman could convey citizenship under the general provisions of § 1401(a)(7) (requiring 10 years of physical presence); but the Government concedes the point only where a noncitizen father legitimated the child. Br. for Pet. 6 n.6.

Amici find this concession appropriate, but too grudging. Amici can locate no case suggesting that § 1409(a) limits acquisition of citizenship through an unwed mother. Rather, § 1409(a) "imposes a set of requirements on the children of citizen fathers born abroad and out of wedlock to a noncitizen mother." *Nguyen v. INS*, 533 U.S. 53, 60 (2001). The idea that an unmarried citizen mother might be able to convey citizenship under § 1401 only if a noncitizen father

legitimated the child is a convoluted reading of the statute, and makes no sense.

Certainly, with regard to an unmarried U.S. Citizen father, § 1409(a) necessarily implies that the conditions of that subsection (requiring that paternity be established by legitimation) must be met in order for the child to acquire citizenship under the listed provisions of § 1401. But it would be illogical for § 1409(a) (governing legitimation by fathers) to limit a claim through a citizen mother. And § 1409(a) does not say otherwise. It provides that specified provisions of § 1401 "shall apply. . . if the paternity of such child is established," but it does not state that those provisions of § 1401 apply *only* where paternity is established. This silence certainly leaves room for a sensible interpretation of § 1409(a). *Cessante ratione legis, cessat ipsa lex.*

Moreover, even if the Government's impractical reading of § 1409(a) were plausible, it would almost certainly be unconstitutional. A reading that would exclude unmarried women from the scope of § 1409(a) and § 1401(a)(7), in those cases where § 1401(a)(7) is more advantageous than § 1409(c), would impermissibly discriminate against unmarried mothers on the basis of gender. *Cf. Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (subjecting gender distinctions to pass intermediate scrutiny).

Moreover, the Government appears to suggest that a mother in this unique posture—having physical presence of more than 10 years, but lacking continuous physical presence for 365 days—could convey citizenship to her child only if she married the child's noncitizen father. This interpretation would in effect "burden illegitimate children for the sake of punish-

ing" a mother for refusing to legitimate a child by marrying the father. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988). It would also intrude into fundamental rights, i.e., "the freedom to marry or not marry," which "resides with the individual." *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *cf. also Zablocki v. Redhail*, 434 U.S. 374, 378 (1978) (law represented "serious intrusion" into freedom to marry). But even if it implicated no fundamental rights or suspect categories, no rational basis could be assigned to a law that would allow citizenship to pass through an unmarried citizen woman only if she married.

Amici see no reason why the gender-based language of § 1409(a) could not itself be construed in a nondiscriminatory manner. The legitimation requirement turns on the laws of various states and countries. For instance, the Agency has found that Peruvian law treats a child as having been legitimated where proof of paternity or maternity was established in a competent proceeding. *Matter of Torres*, 22 I&N Dec. 28, 31, n.3 (BIA 1998). While § 1409(c) refers to the establishment of paternity, that is because maternity is often not subject to dispute. *Nguyen*, 533 U.S. at 62 (noting that maternity "is documented in most instances by the birth certificate or hospital records and the witnesses who attest to her having given birth").[6]

The significance and intent of § 1409(a) is to impose some additional requirements on fathers, for reasons found sufficient in *Nguyen*. An unmarried mother is not prevented from conveying citizenship

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[6] That said, maternity determinations are not always clear. *See, e.g., In re Paternity & Maternity of Infant R.*, 922 N.E.2d 59, 60 (Ind. Ct. App. 2010).

by those provisions, contrary to the Government's suggestions here. Nor would an unmarried father be so limited if the Court permitted the father to convey citizenship under § 1409(c) as well as § 1409(a).

It follows that an expanded application of § 1409(c) would not have the effect of preventing anyone from acquiring citizenship.

C. To the extent that the lower court's remedy was at all unclear, the Court may adopt alternate language.

The Government argues that the lower court's remedy, which sought to conform the statutes to the constitution, is not narrowly tailored enough. Br. for Pet. 51. But rather than proposing modest alternate language which would implement the remedy without the purported negative side effects, the Government pivots from challenging the precise terms of the remedy to arguing for contracting citizenship or for construing the statute prospectively only. *Id.* at 51-54.

The lower court's remedy was not unclear. The conforming language would resolve the constitutional violation in simple, clear terms. Nor, as Amici explain above, would the remedy adopted below implicate the evils assigned it by the Government.

Even if the Government's points were well-taken, they would admit of simple resolution. The goal of the Second Circuit's language was to "replac[e] the ten-year physical presence requirement in § 1401(a)(7) (and incorporated within § 1409(a)) with the one-year continuous presence requirement in § 1409(c)," *Morales-Santana v. Lynch*, 804 F.3d 520, 537 (2d Cir. 2015), as to unwed fathers. To the extent that the lower court's conforming language in

§ 1401(a)(7) could have any of the effects hypothesized by the Government, the simple solution would be to hold, without the need for any explicit conforming language, that the constitution requires § 1409(c) to apply to unwed fathers who satisfy the criteria of § 1409(a), as well as unwed mothers.

III. At-Birth Citizenship Is Not Constrained by 8 U.S.C. § 1421.

The Government argues that even if the relevant statutes violate the constitution, the federal courts may afford no remedy. In support of this proposition, the Government cites a medley of inapposite language from cases involving naturalization or citizenship obtained after birth. Pet. Br. 50-51.

The Government also, in a footnote, cites 8 U.S.C. § 1421(d) as "reflect[ing] the courts' constrained authority" over citizenship matters. Pet. Br. 51 n.11. This footnote is neatly phrased so as to avoid making an actual argument, because the statute simply cannot support any such claim.

It is true that Congress has explicitly constrained authority to grant naturalization to that which is authorized by statute. But the statute also defines the term "naturalization" in terms which clearly exclude at-birth citizenship.

Under 8 U.S.C. § 1101(a)(23), naturalization "means the conferring of nationality of a state upon a person after birth, by any means whatsoever." This definition is crystal clear. It includes all forms of naturalization on application, as well as those automatic citizenship procedures which apply after birth. By the same token, the definition excludes the conferring of nationality at birth. The definition at § 1101(a)(23) governs how the term naturalization is

"used in this chapter." *Id.* § 1101(a). It follows that 8 U.S.C. § 1421(d) is inapplicable on its face to the question at hand.

The context and structure of § 1421, which governs naturalization authority, provide further support for this point. Section 1421 is exclusively concerned with the authority of courts over proceedings to seek naturalization upon application. Neither text nor context supports application of this provision to at-birth citizenship.

IV. At-Birth Citizenship Statutes Protect Family Unity and Respect the Rights and Dignity of U.S. Citizens.

The Government focuses heavily on the role of at-birth citizenship statutes in avoiding statelessness, but it almost entirely overlooks the actual functioning of these statutes. As explained below, at-birth citizenship prevents harm by preserving family unity and respecting the rights and dignity of U.S. citizens.

Amici are only too familiar with the tragic separation of families in cases where at-birth citizenship is inapplicable. When this happens, any minor brush with the law can risk the child's legal status in the United States, and can trigger long periods of immigration detention. *See* 8 U.S.C. § 1226(c) (providing for mandatory detention in some cases). A recent Human Rights Watch report recounted the story of Arnold Aguayo, who was brought to the United States when he was one year old. HUMAN RIGHTS WATCH, A PRICE TOO HIGH: US FAMILIES TORN APART BY DEPORTATIONS FOR DRUG OFFENSES 2-3 (June 2015), https://www.hrw.org/sites/default/files/reports/us061

5_ForUpload_0.pdf. Mr. Aguayo's parents were citizens, but he never naturalized. In a period of drug dependency, he was convicted for minor drug possession offenses. *Id.* He was placed into removal proceedings; he was ultimately granted discretionary relief and allowed to remain in permanent residency status. In the meantime, he was detained. While he was detained, Mr. Aguayo's elderly father had two heart attacks. Mr. Aguayo requested a short leave from detention to say goodbye to his father; that request was denied. *Id.* at 2. On the day his father died, Mr. Aguayo was still in immigration custody.

Mr. Aguayo's story had a "happy" ending by immigration standards. Other U.S. citizen parents must witness their children being deported away from the only country they have ever known, to countries where they do not speak the language, into the face of danger. For instance, that same Human Rights Watch report describes the case of Raul Valdez, who was found ineligible for all relief due to a drug offense. He was deported away from his parents, siblings and children, though he had entered the U.S. at age 1. *Id.* at 30.

Under the current immigration regime, a removal order against Mr. Morales-Santana would be permanent. His conviction from 21 years ago renders him inadmissible as a moral turpitude offense, and he (as one admitted as a permanent resident) is barred from ever seeking a waiver of that ground. 8 U.S.C. § 1182(h)(2). If Mr. Morales-Santana is removed, he will never be able to return to live in this country, regardless of family ties, rehabilitation, or other discretionary factors. *Id.*; *see also* 8 U.S.C. § 1182(a)(9).

Respondent's father might not demonstrate ongoing harm from his son's removal, because he has already passed away. In a larger sense, though, the harm to Respondent's father was complete at Respondent's birth. Respondent, under the Government's approach, was always subject to the risk of losing his right to live in this country because his citizen parent was a man instead of a woman. The stake which U.S. citizen parents have in the question of their children's citizenship is both personal and familial. A parent is subject to direct, tangible harm not only from the loss of support from the child, the destruction of family unity, and the stress of worrying about a child living in a distant land, but from the risk all through that child's life that his ability to live in his father's country is conditioned on his continued good behavior.

V. Other Automatic Citizenship Provisions, Enacted Simultaneously with § 1409(c), Are Further Evidence That the Statute Impermissibly Discriminates Against Unmarried Fathers.

The INA contains other provisions which grant automatic citizenship after a child's birth, provisions which are inapplicable to Respondent and are not directly relevant to this case. Those provisions provide further reason to believe that these statutes reflect assumptions and gender stereotypes which are impermissible in this context.

The Government accurately cites current 8 U.S.C. § 1431(a) (2015) as ameliorating some of the inequality of § 1409 for a hypothetical individual who is like Respondent except young enough to be covered by the 2001 statute. Under current § 1431(a), an individual like Respondent would become a citi-

zen after entering the United States as a permanent resident while a custodial parent is a U.S. citizen. The statute now applies regardless of when or how the parent became a citizen. 8 U.S.C. § 1431(a)(1).

The law applicable to Respondent differed in several respects. The prior statute only applied to parents who naturalized, not to citizen parents who were native-born. *See* 8 U.S.C. §§ 1431, 1432 (1952).

Under old § 1432, enacted together with § 1409(c), a child became a citizen if the child had permanent resident status and (a) both parents naturalized, 8 U.S.C. § 1432(a)(1) (1958); (b) a second parent naturalized when the first parent was already a citizen, 8 U.S.C. § 1431 (1952); or (c) the sole remaining parent naturalized when the other parent was deceased. 8 U.S.C. § 1432(a)(2) (1958). Most relevant here, § 1432 had a provision allowing a single parent to convey citizenship. That provision provided that citizenship was granted upon:

> The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation.

8 U.S.C. § 1432(a)(3) (1958). Litigants have argued that "legal separation" may be read to include two parents who have separate legal existences as unmarried people, but the Government has argued, and courts have unanimously agreed, that "legal separation" can occur only where the child's parents were legally married and subsequently divorced or separated. *See Wedderburn v. INS*, 215 F.3d 795, 799-800 (7th Cir. 2000).

Thus, § 1432 allowed citizenship to be conveyed through fathers only where they had been married at some point to the child's mother. An unmarried father could never convey citizenship under § 1432, with the sole exception of cases where the mother was deceased. Cf. 8 U.S.C. § 1432(a)(2) . An unmarried mother, by contrast, could convey citizenship so long as paternity had not been established by legitimation before the child obtained citizenship. 8 U.S.C. § 1432(a)(3) (1952).

In the § 1409 context, the Government argues that the gender discrimination serves important Governmental purposes. Those arguments fail in that context, but are also belied by § 1432(a), enacted simultaneously with § 1409. Both statutes preclude the unmarried father from conveying citizenship even where the father is granted legal custody of the child. The only fair explanation for § 1432, like § 1409, is that Congress was influenced by gender stereotypes and thought that unmarried fathers would not have as significant a role in the lives their children as an unmarried mother. No logical basis for the statutory distinction can be assigned without employing those gender stereotypes. Since those gender stereotypes are impermissible in this context, it follows that the statute is unconstitutional as written.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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